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Reid, Colin

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Environmental governance in Scotland – watchdog, principles and policy

Colin T Reid, Professor of Environmental Law at the University of Dundee

At a glance

The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (the Continuity Act) gained Royal Assent in late January and does five things that establish a new framework for environmental governance in Scotland:

- Gives Scottish Ministers the power to make regulations keeping up with EU law in line with their policy of dynamic alignment.
- Grants legal recognition to environmental principles.
- Establishes Environmental Standards Scotland as a new environmental watchdog in Scotland to oversee the effectiveness of and compliance with environmental law.
- Requires a review of environmental governance, including access to justice, in Scotland and
- Requires the development of an environmental policy strategy for Scotland.

In the week before Christmas, the Continuity Act completed its passage through the Scottish Parliament. The [Act](#) establishes the new framework for environmental governance in Scotland, filling the post-Brexit gaps, as well as providing powers to implement the Scottish Government's policy of continuing dynamic alignment with EU law. There are some broad parallels with parts of the Environment Bill slowly making its way through Westminster, but also very clear differences. After the mandatory waiting period required for all Acts of the Scottish Parliament in case there is to be a legal challenge to their competence, the Act received Royal Assent on 29 January 2021. The new legislation does five things.

Dynamic alignment

The Continuity Act confers on the Scottish Ministers a broad power to make regulations corresponding with or implementing EU laws, similar to the power previously enjoyed under the European Communities Act 1972. This power enables the Scottish Government to carry out its policy of dynamic alignment with the EU, keeping in step with EU laws with a view to a future independent Scotland being in a position to reapply for membership. Concerns over the lack of control over the use of this wide ministerial power have led to the inclusion of a statutory statement of the purposes for which the power may be used (which include maintaining and advancing environmental standards) and of requirements on the Scottish Government to produce both a formal policy statement on how this power will be exercised and annual reports on its use.

To the extent that the Scottish Government decides to follow EU developments but the UK Government does not, the use of this power may create the regulatory divergence that the United Kingdom Internal Market Act 2020 tries to resolve. The risk that reliance on the market access principles in that Act, rather than the common frameworks approach, will inflame rather than soothe tensions between governments is a matter for discussion elsewhere.

Environmental principles

One consequence flowing from Brexit is the loss of the legal status enjoyed by the environmental principles embedded in the EU Treaties. This gap is now filled by granting legal recognition to the principles in Scottish law, covering the integration principle, the precautionary principle, the preventive principle, the principle prioritising rectification at source and the polluter pays principle. The first of these was not in the original Continuity Bill, but the final list now matches what is in both the Environment Bill at Westminster and in the EU-UK Trade and Cooperation Agreement (Part Two, Heading One, Title XI, art 7.4, which uses slightly different wording from that in either Bill or the EU Treaties).

Scottish Ministers, Ministers of the Crown in relation to matters in Scotland within the competence of the Scottish Parliament and other public authorities are all obliged to have due regard to the principles in making policies. The scope of the duty extends to all policy and planning functions covered by the existing requirements for Strategic Environmental Assessment. It should be remembered that under the Environmental Assessment (Scotland) Act 2005, these requirements extend well beyond the categories of plans requiring such assessments in the rest of the UK where the limits of the underlying EU Directive have been maintained.

Those who are familiar with the equivalent proposals in the Environment Bill at Westminster will spot a number of differences. Firstly, in determining what the principles mean in Scotland, regard must be had to the interpretation of the principles by the Court of Justice of the European Union. Secondly, the duty applies to all public authorities, not just Ministers. Thirdly, although the Scottish Ministers must publish guidance on the interpretation of the principles and the implementation of this new duty, the Ministers and other public authorities must have due regard to the principles themselves, not just to the ministerial policy statement.

The Continuity Act also requires Scottish Ministers and authorities to fulfil their duties in relation to the principles with a view to protecting the environment and contributing to sustainable development. This sets a wider context for their consideration, albeit one that overlaps with existing sustainability duties under the Climate Change (Scotland) Act 2009.

Environmental Standards Scotland

Environmental Standards Scotland (ESS) is established as the new environmental 'watchdog' to consider the implementation of and compliance with environmental law in Scotland. Although broadly similar to the Office for Environmental Protection (OEP) that will look at matters in England and Northern Ireland, there are significant differences.

In both cases members are appointed by Ministers, but the independence of ESS is given greater emphasis by a further requirement for parliamentary approval of the appointments. Ministerial control over finances and terms of appointment means that the link with government is not wholly severed, but there are express provisions that ESS is not subject to the direction or control of the Scottish Government and that Ministers will seek to ensure that it has 'reasonably sufficient' resources to perform its functions. Unlike the OEP, ESS has no role in advising the Government nor in monitoring progress on plans and targets.

The task of ESS is to monitor public authorities' compliance with environmental law and the effectiveness of environmental law and its implementation. This explicitly includes keeping under review the implementation of the UK's international obligations relating to environmental protection. In all of its tasks it can act on its own initiative or on the basis of representations received.

A strategy must be produced by ESS on how it is to carry out its functions. The intention is that ESS should operate at a fairly high level and not get embroiled in the details of

individual cases. Accordingly, ESS is precluded from exercising its powers in relation to a particular person or regulatory decision. The focus should therefore be on dealing with systemic issues, rather than ESS being used as yet another route of appeal by disgruntled parties in a contentious case, although it is recognised that this should not stand in the way of it addressing wider issues that may emerge in an individual case.

Where it identifies problems, ESS has stronger powers than the OEP. Whether in relation to the effectiveness of the law or compliance with it, ESS can make an improvement report to be sent to Ministers and laid before Parliament. The Ministers must then respond by preparing an improvement plan which is, in turn, to be laid before Parliament. The plan must include the measures to be taken, the proposed timescale and arrangements for reviewing and reporting on progress. The Parliament has the opportunity to reject this plan and require that a revised one is prepared.

In the event of a public authority (which includes a Minister) failing to comply with environmental law in a way that is causing, risks causing or has caused environmental harm, ESS can issue a compliance notice setting out the remedial steps to be taken. The authority has the right of appeal to the sheriff court but failure to comply with the notice can be reported to the Court of Session. The Court can issue whatever order for enforcement it considers appropriate and treat the matter as if it were a contempt of court.

ESS thus has a much more direct enforcement power than is proposed for the OEP, which can merely seek a form of judicial review. ESS can also initiate judicial reviews itself in serious cases and has an explicit power to intervene in other civil litigation. This stronger enforcement power is balanced by the right of appeal (although the fact that this is to the sheriff court will re-open arguments about the haphazard allocation of appellate functions between various courts and Ministers in Scottish environmental law).

Review of environmental governance

A provision added at a late stage of the Continuity Act's progress requires the Scottish Ministers to produce a report on the effectiveness and appropriateness of post-Brexit environmental governance arrangements. This must include whether there is effective and sufficient access to justice on environmental matters and whether the establishment of an environmental court would enhance the position. The review must begin within six months of ESS publishing its first formal strategy.

Given the initially narrow focus of the Continuity Act, filling post-Brexit gaps rather than looking at environmental governance more widely, the inclusion of this provision promises a more considered reflection on environmental frameworks in the near future, away from the immediate bustle of Brexit.

Environmental policy strategy

A further provision added at a late stage is a requirement on Scottish Ministers to produce an environmental policy strategy setting out objectives for protecting and improving the environment, policies and proposals for achieving this and arrangements for monitoring progress. Regard must be had to the desirability of securing a number of objectives, including aiming at a high level of environmental protection, contributing to sustainable development and responding to the global crises in relation to climate change and biodiversity. Annual reports on progress are required and Ministers must have due regard to the strategy in making policies, including proposals for legislation.

The Scottish Ministers published [The Environment Strategy for Scotland: vision and outcomes](#) in February 2020 and one of the reactions to this was to argue for the strategy to be given statutory status. Work on the strategy will now be progressing within this statutory framework, but there is no equivalent of the environmental improvement plans or statutory targets required under the Environment Bill at Westminster.

Conclusion

As a response to Brexit, the Continuity Act was introduced to serve the core purposes of enabling dynamic alignment with the EU and filling the accountability gap created by the loss of the environmental oversight provided by the EU Commission and the Court of Justice of the European Union. Further provisions have been added to make it a more far-ranging environmental measure, imposing requirements for a review of environmental governance and an environmental policy strategy. The facts that the gaps have been filled, a potentially powerful watchdog created and that environmental principles given legal status are to be welcomed, as is the clearer framework for the future strategy and governance review.

Nevertheless, with an election due in May (although with growing talk of a Covid-induced postponement), it will be only after then that we are likely to see how far the current Scottish Government's rhetoric on responding to the climate change and biodiversity crises will be carried forward and really drive future policies. Similarly, the significance of the power to maintain alignment with the EU will become clearer only as the UK Government's plans for any divergence from EU rules materialise and the UK internal market provisions come to be applied and their impact understood.

There are lots of loose ends in the EU-UK Trade and Cooperation Agreement, and even more in working out how the new relationships within and beyond will work. The end of 2020 does not mean the end of Brexit as a key element in our political and legal life.

Colin T Reid is Professor of Environmental Law at the University of Dundee. He is a Patron of UKELA and a member of its governance and devolution group. On Brexit matters he has given evidence to parliamentary committees at both Westminster and Holyrood and serves as adviser to one committee at Holyrood.

This paper is based on blogs which have appeared at the [Brexit and Environment](#) website.